Koh Keng Joo & Anor v Tan Sri Dato' Seri Khalid bin Abu Bakar & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCVC-17–02 OF 2020
SU TIANG JOO J
15 AUGUST 2024

Civil Procedure — Discovery — Discovery of documents — Plaintiffs sought for defendants to produce Special Task Force report that was put up after Human Rights Commission of Malaysia ('SUHAKAM') found that abduction of first plaintiff's amounted to 'enforced disappearance' — Whether application was fishing expedition — Whether there was lack of pleading by plaintiffs — Whether delay was fatal to application — Whether report classified as official secret — Whether findings of SUHAKAM and report was irrelevant — Whether report was public document

The first plaintiff was also known as Pastor Raymond Koh, whose wife was the second plaintiff. The first plaintiff had been missing since 13 February 2017. The plaintiffs claimed he was a victim of enforced disappearance perpetrated by the defendants. The causes of action pleaded were unlawful abduction of the first plaintiff, failure to account or disclose his whereabouts, misfeasance in public office, conspiracy to injure, negligence, and breach of constitutional and statutory rights. The plaintiffs pleaded, inter alia, that the abduction of the first plaintiff was the subject of a public inquiry by the Human Rights Commission of Malaysia ('SUHAKAM'). SUHAKAM in its findings stated that the abduction of the first plaintiff amounted to one of 'enforced disappearance' carried out by the special branch of the police force. The defendants pleaded that: (a) the first plaintiff was abducted by persons unknown and investigations by the police were ongoing; and (b) the findings of SUHAKAM were not binding on the court in this action. In the course of the trial, the plaintiffs applied an application pursuant to O 24 rr 7, 8, 8A, 11(2) and (3), 12 and/or 13 of the Rules of Court 2012 ('the ROC') and/or arts 5 and 8 of the Federal Constitution ('the FC') and/or the inherent jurisdiction of this court ('the discovery application') for, inter alia, the following order: (i) that the defendants who had in their possession, custody, power and/or control the Special Task Force ('STF') report entitled 'Laporan Pasukan Khas bagi Kehilangan Amri Che Mat dan Pastor Raymond Koh' ('STF report') shall produce for inspection and make copies to the second plaintiff and the plaintiffs' solicitors the STF report; and (ii) the second plaintiff and/or the plaintiffs' solicitors shall be at liberty to peruse and make copies of the STF report to be used as evidence at the trial of this suit.

Held, granting an order in terms of the discovery application:

(1) The defendants admitted in their affidavits that the STF report existed. For the defendants to then assert that the discovery application was a fishing expedition was a scurrilous challenge (see para 29).

(2) The lack of pleading point advanced by the defendants was devoid of merit for the following reasons: (a) there was no averment that the STF report and its contents had come into the possession of the plaintiffs. Thus, as a matter of common sense, how were the plaintiffs to plead the same; and (b) a discovery application could be allowed for an unpleaded issue (see para 31).

(3) Delay was not by itself sufficient reason to deny discovery if it fulfilled the requirements of O 24 rr 12 and 13 of the ROC. There was a continuing obligation or duty for discovery imposed on the parties throughout the proceedings. This included not only the trial of this action in the High Court but in any appeal that may be brought. It followed that if discovery could be ordered even after the conclusion of the trial in this action, delay per se was not fatal to a discovery application (see paras 35–36).

(4) The affidavits filed by the defendants: (a) did not show that the STF report had been classified as an official secret by a public officer pursuant to s 2B of the Official Secrets Act 1972 ('the OSA'); (b) did not show that the deponent of the two affidavits had deposed that any one of them was a public officer certified under s 2B of the OSA empowered to certify an official document, information or material as an official secret; and (c) there was no certificate produced under s 16A of the OSA certifying that the STF report was an official secret. A mere statement that the STF report was 'Sulit' or 'Confidential' on the cover of a register saying 'Buku Daftar Suratan Rahsia Rasmi di luar Jadual/Bawah Akta Rahsia Rasmi 1972' did not satisfy the pre-conditions of ss 2B and 16 of the OSA required to shield it with privilege against disclosure (see paras 40 & 42).

(5) Whilst the findings of SUHAKAM and the STF report may not be binding on this court, subject to evaluation by this court and the weight to be attached, the evidence led during the SUHAKAM inquiry and the STF inquiry especially those that required recollection of what was seen, heard and felt would be useful because they would be more contemporaneous in time. The findings although not binding, may be persuasive. Therefore, the evidence and the findings on the very issue under consideration by this court — that of the disappearance of Pastor Raymond Koh, would be desirable (see paras 48–50).

(6) The STF was established by the Cabinet. That it was an administrative decision made by the Cabinet would be sufficient for it to come under the wide ambit of authority conferred by art 39 of the FC. Applying the presumption in s 114(e) of the Evidence Act 1950 ('the EA') which

flowed from the maxim *omnia praesumunturrite esse acta* (that in the absence of evidence to the contrary, it is presumed that official acts have been done in accordance with all relevant technicalities), it followed that the STF report prepared by the STF appointed by the Cabinet was prima facie a public document. Thus, it would be relevant pursuant to ss 35 and 74 of the EA (see paras 62–63).

[Bahasa Malaysia summary

Plaintif pertama juga dikenali sebagai Pastor Raymond Koh, yang isterinya adalah plaintif kedua. Plaintif pertama telah hilang sejak 13 Februari 2017. Plaintif mendakwa bahawa dia adalah mangsa kehilangan paksa yang dilakukan oleh defendan. Kausa tindakan yang dikemukakan adalah penculikan tidak sah terhadap plaintif pertama, kegagalan untuk memberi laporan atau mendedahkan keberadaannya, penyalahgunaan kuasa dalam jawatan awam, konspirasi untuk mencederakan, kecuaian, dan pelanggaran hak perlembagaan dan berkanun. Plaintif memplid, antara lain, bahawa penculikan plaintif pertama adalah subjek siasatan awam oleh Suruhanjaya Hak Asasi Manusia Malaysia ('SUHAKAM'). SUHAKAM dalam penemuannya menyatakan bahawa penculikan plaintif pertama merupakan salah satu 'kehilangan paksa' yang dijalankan oleh cawangan khas pasukan polis. Defendan mendakwa bahawa: (a) plaintif pertama telah diculik oleh orang yang tidak dikenali dan siasatan oleh pihak polis masih berjalan; dan (b) penemuan SUHAKAM tidak mengikat mahkamah dalam tindakan ini. Dalam proses perbicaraan, plaintif memohon permohonan menurut A 24 kk 7, 8, 8A, 11(2) dan (3), 12 dan/atau 13 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan/atau perkara 5 dan 8 Perlembagaan Persekutuan ('PP') dan/atau bidang kuasa mahkamah ini ('permohonan penzahiran') untuk, antara lain, perintah berikut: (i) bahawa defendan yang mempunyai dalam pemilikan, jagaan, kuasa dan/atau kawalan laporan Pasukan Petugas Khas ('STF') bertajuk 'Laporan Pasukan Khas bagi Kehilangan Amri Che Mat dan Pastor Raymond Koh' ('laporan STF') hendaklah dikeluarkan untuk pemeriksaan dan membuat salinan kepada plaintif kedua dan peguam plaintif; dan (ii) plaintif kedua dan/atau peguam plaintif berhak untuk meneliti dan membuat salinan laporan STF untuk digunakan sebagai keterangan dalam perbicaraan saman ini.

Diputuskan, membenarkan perintah dipohon menurut terma-terma permohonan penzahiran:

(1) Defendan mengaku dalam afidavit mereka bahawa laporan STF wujud. Oleh itu, untuk defendan mendakwa bahawa permohonan penzahiran adalah satu 'fishing expedition' adalah satu cabaran yang tidak wajar (lihat perenggan 29).

(2) Hujahan kekurangan pliding daripada defendan tidak mempunyai merit atas sebab-sebab berikut: (a) tiada penegasan bahawa laporan STF dan

kandungannya telah berada dalam pemilikan plaintif. Maka, sebagai satu perkara yang logik, bagaimana plaintif seharusnya memplid yang sama; dan (b) permohonan penzahiran boleh dibenarkan untuk isu yang tidak diplidkan (lihat perenggan 31).

(3) Kelewatan bukan dengan sendirinya alasan untuk menolak penzahiran jika ia memenuhi keperluan A 24 kk 12 dan 13 KKM. Terdapat kewajipan atau tanggungjawab yang berterusan untuk penzahiran yang dikenakan ke atas pihak-pihak sepanjang prosiding ini. Ini termasuk bukan sahaja perbicaraan tindakan ini di Mahkamah Tinggi tetapi juga dalam sebarang rayuan yang mungkin dibawa. Oleh itu, jika penemuan boleh diperintahkan walaupun setelah tamat perbicaraan dalam tindakan ini, kelewatan itu sendiri tidak memudaratkan permohonan penzahiran (lihat perenggan 35–36).

(4) Afidavit yang difailkan oleh defendan: (a) tidak menunjukkan bahawa laporan STF telah diklasifikasikan sebagai rahsia rasmi oleh pegawai awam menurut s 2B Akta Rahsia Rasmi 1972 ('ARR'); (b) tidak menunjukkan bahawa deponen dua afidavit tersebut menyatakan bahawa salah seorang daripada mereka adalah pegawai awam yang disahkan di bawah s 2B ARR yang diberi kuasa untuk mengesahkan dokumen rasmi, maklumat atau bahan sebagai rahsia rasmi; dan (c) tiada sijil yang dikeluarkan di bawah s 16A ARR yang mengesahkan bahawa laporan STF adalah rahsia rasmi. Sekadar menyatakan bahawa laporan STF adalah 'Sulit' atau 'Confidential' pada muka depan daftar yang menyatakan 'Buku Daftar Suratan Rahsia Rasmi di luar Jadual/Bawah Akta Rahsia Rasmi 1972' tidak memenuhi syarat-syarat s 2B dan 16 ARR yang diperlukan untuk melindunginya dengan keistimewaan daripada penzahiran (lihat perenggan 40 & 42).

(5) Walaupun penemuan SUHAKAM dan laporan STF mungkin tidak mengikat mahkamah ini, tertakluk kepada penilaian mahkamah ini dan berat yang akan diberikan, keterangan yang dikemukakan semasa siasatan SUHAKAM dan siasatan STF, terutamanya yang memerlukan ingatan tentang apa yang dilihat, didengar, dan dirasakan, akan berguna kerana ia lebih sezaman. Penemuan walaupun tidak mengikat, boleh bersifat meyakinkan. Oleh itu, keterangan dan penemuan mengenai isu yang sedang dipertimbangkan oleh mahkamah ini — mengenai kehilangan Pastor Raymond Koh, adalah wajar (lihat perenggan 48–50).

(6) STF ditubuhkan oleh Kabinet. Bahawa ia merupakan keputusan pentadbiran yang dibuat oleh Kabinet sudah mencukupi untuknya berada di bawah skop kuasa yang luas yang diberikan oleh perkara 39 PP. Dengan menerapkan anggapan dalam s 114(e) Akta Keterangan 1950 ('AK') yang mengalir daripada pepatah *omnia praesumunturrite esse acta* (bahawa sekiranya tiada bukti sebaliknya, adalah dianggap bahawa tindakan rasmi telah dilakukan mengikut semua teknikal yang

berkaitan), maka laporan STF yang disediakan oleh STF dilantik oleh Kabinet adalah prima facie dokumen awam. Oleh itu, ia akan relevan menurut s 35 dan 74 EA (lihat perenggan 62–63).]

Cases referred to

ABX Logistics (Malaysia) Sdn Bhd v Overseas Bechtel (Malaysia) Sdn Bhd [2003] MLJU 529; [2003] 7 CLJ 357, HC (refd)
BA Rao & Ors v Sapuran Kaur & Anor [1978] 2 MLJ 146, FC (folld)
The Compagnie Financiere Et Commerciale Du Pacifique v The Peruvian Guano Company (1882) 11 QBD 55, CA (refd)
Datuk Amar James Wong Kim Min & Anor v Pendaftar Pertubuhan [2004] 6 MLJ 235, HC (refd)
Datuk Haji Dzulkifli bin Datuk Abdul Hamid v PP [1981] 1 MLJ 112, FC (folld)
Dibena Enterprise Sdn Bhd v Huawei Technologies (Malaysia) Sdn Bhd & Anor [2012] MLJU 154; [2012] 8 CLJ 221, HC (refd)
Format Communications Mfg Ltd v ITT (UK) Ltd [1983] FSR 473 (refd)
George Ballantine Son Ltd and others v FER Dixon Son Ltd and others [1974] 1 WLR 1125, Ch D (refd)
Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors [2000] 1 MLJ 65, HC (refd)
Kerajaan Malaysia v Shimizu Corp & Ors [2018] MLJU 169; [2018] 1 LNS 202, HC (refd)
Malaysia Debt Ventures Berhad v Platinum Techsolve Sdn Bhd & Ors [2020] MLJU 1421, CA (refd)
Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors [2009] 5 ML J 40, CA (refd)
Norhayati bt Mohd Ariffin v Mohd Russaini bin Idrus & Anor [2023] 12 MLJ 445; [2023] 9 CLJ 304, HC (refd)
Pangsapuri Anda Management & Ors v Pembinaan Safilo Sdn Bhd [2021] MLJU 161, HC (refd)
Phillips v Phillips [1879] 40 LT 815 (refd)
Protasco Bhd v Tey Por Yee & Anor and other appeals [2021] 6 MLJ 1, FC (refd)
PP v Lai Kon Ching & Anor [1994] 3 MLJ 621, HC (refd)
Rotta Research Laboratorium SpA & Anor v Ho Tack Sien & Ors [2010] 8 MLJ 733; [2010] 10 CLJ 491, HC (folld)
Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (folld)

Legislation referred to

Courts of Judicature Act 1964 s 69
Enforcement Agency Integrity Commission Act 2009 ss 4, 5, 17, 22
Evidence Act 1950 ss 35, 74, 114(e)
Federal Constitution arts 5, 8, 39
Human Rights Commission of Malaysia Act 1999 s 14(1)(d)

Official Secrets Act 1972 ss 2B, 16A
Public Authorities Protection Act 1948 s 2(b)
Rules of Court 2012 O 15 r 17(1), (2), O 18 r 7, O 24 rr 1(1), 3(1), 7, 7(3), (4), 8, 8A, 11(2), (3), 12, 13, O 94 r 4

Jerald Gomez (Steven Thiru, Michelle Wong Mew Ling and Ananthan Moorthi with him) (Jerald Gomez & Assoc) for the plaintiff.
Nurul Farhana bt Khalid (Zetty Zurina bt Kamaruddin, Salwati bt Umar and Fariza Amira bt Azman with him) (Federal Counsel, Attorney General's Chamber) for the defendants.
Andrew Khoo Chin Hock watching brief for the Bar Council.

Su Tiang Joo J:

INTRODUCTION

[1] In the course of trial, the plaintiffs applied (encl 93) pursuant to O 24 rr 7, 8, 8A, 11(2), (3), 12 and/or 13 of the Rules of Court 2012 ('the ROC'), and/or arts 5 and 8 of the Federal Constitution and or the inherent jurisdiction of this court ('the discovery application') for the following order:

(a) that the defendants who have in their possession, custody, power and/or control the special task force report entitled 'Lapuran Pasukan Khas bagi Kehilangan Amri Che Mat dan Pastor Raymond Koh' ('STF report') shall forthwith and in any event no later than three days from the date of this order produce for inspection and make copies to the second plaintiff and the plaintiffs' solicitors the STF report;

(b) that consequent upon prayer (a) above, the second plaintiff and/or the plaintiffs' solicitors shall be at liberty to peruse and make copies of the STF report to be used as evidence at the trial of this suit;

(c) cost in the cause; and

(d) such further or other relief as this honourable court deems fit and just.

[2] The defendants opposed the application.

MATERIALS LAID BEFORE THE COURT

[3] The discovery application is supported by two affidavits affirmed by the second plaintiff (encls 94 and 111) whereas three affidavits were filed in opposition to the application by the defendants (encls 107, 108 and 121).

[4] Written submissions were presented by learned counsel for the plaintiffs (encl 117 — primary submissions and encl 126 — submissions in reply) and by learned senior federal counsel ('SFC') (encl 115 — primary submissions and

encl 123 — submissions in reply). These were supplemented with the presentation of oral submissions on 29 July 2024.

SALIENT BACKGROUND

[5] The first plaintiff is also known as Pastor Raymond Koh and his wife is the second plaintiff. The first plaintiff has gone missing as from 13 February 2017. His disappearance is the reason for this suit. The plaintiffs claim he is a victim of enforced disappearance perpetrated by the defendants comprising the first to the ninth defendants being police officers, the tenth defendant who is associated with the police, the 11th defendant being the Chief Police Officer, the 12th defendant being the Royal Malaysian Police force and the 13th defendant being the Government of Malaysia.

[6] When the trial opened on 6 June 2023, I had acting pursuant to O 15 rr 17(1) and (2) of the ROC, and the inherent powers of the court under O 92 r 4 of the ROC ordered that the second plaintiff, who is the wife of Pastor Raymond Koh be made his litigation representative with the right to conduct this action not only for herself but also for and on his behalf with retrospective effect equivalent to *nunc pro tunc* from a date just prior to the filing of this suit. This I made on the premise that the words 'where a party to an action dies' in O 15 r 17(1) of the ROC is wide enough to include a party who has gone missing.

[7] The causes of action pleaded in the amended statement of claim (encl 18 p 32) are as follows:

(a) unlawful abduction of Pastor Raymond Koh;

(b) failure to account or disclose his whereabouts;

(c) misfeasance in public office;

(d) conspiracy to injure;

(e) negligence; and

(f) breach of constitutional and statutory rights.

[8] The reliefs sought by the plaintiffs are:

(a) an order that the defendants ascertain and disclose the whereabouts of Pastor Raymond Koh;

(b) an order that the police arrest the tenth defendant (Saiful Bahari bin Abdul Aziz) and bring him to court to give evidence on oath on his involvement and or his vehicle's involvement in the abduction of Pastor Raymond Koh;

(c) a declaration that the constitutional rights of the plaintiffs have been violated;

(d) damages — general and exemplary;

(e) interest on the damages;

(f) costs; and

(g) such further or other relief as this court deems just.

[9] The plaintiffs pleaded, inter alia, that the abduction of Pastor Raymond Koh was the subject of a public inquiry by the Human Rights Commission of Malaysia ('SUHAKAM') which were attended by officers from the Royal Malaysian Police force. That on 3 April 2019, SUHAKAM released its findings saying that the abduction of Pastor Raymond Koh amounted to one of 'enforced disappearance' as defined under the International Convention on the Protection of all Persons from Enforced Disappearance 2006 and that it was carried out by the Special Branch of the police force at Bukit Aman, Kuala Lumpur.

[10] All the defendants are represented by the Attorney General Chambers. A common defence was filed.

[11] The defendants pleaded that Pastor Raymond Koh was abducted by persons unknown. Investigations by the police are ongoing. That the findings of SUHAKAM that 'The panel is of the considered view that the enforced disappearance of Pastor Raymond Koh was carried out by agents of the State namely, the Special Branch, Bukit Aman, Kuala Lumpur' and which also contained a statement saying that 'The panel further finds that there is no evidence to support the contention, as suggested by counsel on behalf of Pastor Raymond Koh, that Pastor Raymond Koh was abducted by persons or groups of persons acting with the authorisation, support or acquiescence of the state' are not binding on the court in this action.

[12] The defendants pleaded in their defence filed on 15 June 2020 that despite their efforts, the tenth defendant, Saiful Bahari bin Abdul Aziz, could not be found.

[13] In gist, the defendants denied any liability and pray for the plaintiffs' claim to be dismissed with costs to be taxed as between solicitor and client pursuant to s 2(b) of the Public Authorities Protection Act 1948 ('Revised 1978') Act 198.

STATUS OF THE TRIAL

[14] At the time the discovery application was filed on 30 May 2024, the trial had run for 13 days with seven witnesses having been called by the plaintiffs. The plaintiffs have yet to close their case.

[15] By the time the discovery application was heard on 29 July 2024, the trial had run for a further three days. During the course of the plaintiffs' case, learned counsel for the plaintiffs informed the court that they are making efforts to trace and to secure the attendance of one witness by the name of Saiful Afdzan bin Seinei.

DOCUMENT SOUGHT

[16] The document sought to be produced by the defendants is the STF report entitled 'Lapuran Pasukan Khas bagi Kehilangan Amri Che Mat dan Pastor Raymond Koh'. That this document exist is indisputable as can be seen in paras 7.1 to 7.3 of the affidavit in reply (encl 108) filed by the defendants wherein the deponent, one Syuhana bt Khalidi, deposed that:

(a) the Cabinet (of Ministers) had on 8 May 2019 decided to set up a Special Task Force ('STF') to study the findings of SUHAKAM on the disappearance of Amri Che Mat and Pastor Raymond Koh and to put up a report and recommendations to the government;

(b) the terms of reference of the Special Task Force were to:

(i) study the SUHAKAM report and to verify the matters raised therein;

(ii) evaluate the operating procedure and investigative procedure of the Royal Malaysian Police on the two cases of disappearance;

(iii) recommend improvements on the investigation; and

(iv) put up a report and recommendations to the government.

(c) the report on the disappearance of Pastor Raymond [Koh] is classified as 'sulit' or 'confidential' and recorded as such in the 'Buku Daftar Suratan Rahsia Rasmi di luar Jadual/Bawah Akta Rahsia Rasmi 1972'.

[17] By way of a further affidavit (encl 121) Syuhana bt Khalidi exhibited the entry in the record in manuscript which carries the title 'Lapuran Pasukan Khas bagi Kehilangan Amri Che Mat dan Pastor Raymond Koh' which she averred was inadvertently omitted from being exhibited in her earlier affidavit (encl 108).

[18] The plaintiffs assert that the investigations and findings in the STF

report are 'relevant and crucial' to the plaintiffs to prove their case and should be laid before the court 'to arrive at the truth and come to a fair and just decision'.

TEST

[19] Besides that the document ('STF report') exists, and is in the possession of the defendants, the other elements to be fulfilled for an order for discovery are set out in O 24 r 7(3) of the ROC namely that the document falls within one of the following descriptions:

(a) a document on which the party relies or will rely;

(b) a document which could —

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) a document which may lead the party seeking discovery of it to a series of inquiry resulting in his obtaining information which may —

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

[20] Although the above criteria make it rather permissive for discovery to be ordered, there is a qualification to be met which is housed in O 24 r 7(4) of the ROC and is reproduced below:

> (4) An order under this rule shall not be made in any cause or matter in respect of any party before an order under rule 3 has first been obtained in respect of that party, unless, in the opinion of the court, the order is necessary or desirable.

[21] This is reinforced by the provisions of O 24 r 8 of the ROC which provides as follows:

> On the hearing of an application for an order under rule 3, 7 or 7A, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

[22] A number of case authorities were cited by both parties on the test to be adopted. However, in my considered view, there is no necessity to trawl through the myriad of cases as the test is clearly set out in O 24 r 7(3), (4) and O 24 r 8 of the ROC above.

[23] Be that as it may, in most if not all cases on discovery, it is undoubted that the leading authority is that of *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581 a decision of Edgar Joseph Jnr SCJ (later FCJ) and which has been cited by both the plaintiffs and the defendants. In *Yekambaran* the following passage is oft-quoted and which is relevant to the application before me.

> It is indisputable, that the items of which discovery is sought are documents and that they are in the possession, custody or power of the defendant and nothing more need be said about this.
>
> As to 'relevance', our rules of the High Court limit discovery to documents which are 'relevant to' or 'relate' to the factual issues in dispute.
>
> More particularly, the discovery obligation applies to documents 'relating to matters in question in the action' (Rules of the High Court, O 24 r 1(1)) or 'relating to any matter in question in the cause or matter' (O 24 r 3(1)). In practice, relevance is primarily determined by reference to the pleadings *but there need not be a pleading for a matter to be said to be in issue*. See *Phillips v Phillips* [1879] 40 LT 815.
>
> In this context, relevance is defined broadly. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue (see *George Ballantine Son Ltd and others v FER Dixon Son Ltd and others* [1974] 1 WLR 1125). If, however, the document's relevance is to a fact in issue, not simply to credibility, it has long been settled that relevance of an indirect kind suffices.
>
> The classic authority, on the test for relevance in the context of discovery is *The Compagnie Financiere Et Commerciale Du Pacifique v The Peruvian Guano Company* (1882) 11 QBD 55 where Brett LJ said this p 63:
>
> > It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly', because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences ...
>
> The observation of Edward Bray in his highly regarded work on discovery at p 18 as to the test of 'materiality' merits quotation; there he says this:
>
> > *... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.*
> >
> > *I note that proposition received judicial approval in Format Communications Mfg Ltd v ITT (UK) Ltd* [1983] FSR 473.
> >
> > *In determining the question of relevance, therefore, I would have to apply the principles to be distilled from the authorities which I have cited.*

[24] A reading of the above quoted passage would make it obvious that the test described in *Yekambaran* has made its way into the Rules of Court 2012. However, just like what His Lordship Edgar Joseph Jnr SCJ had laid emphasis on, it is to be observed that for the purpose of testing the materiality of the discovery to a particular issue, it is the case of the party seeking discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.

COURT'S ANALYSIS

[25] The title of the STF report is self-descriptive. It is on the disappearance of Amri Che Mat and Pastor Raymond Koh.

[26] Applying the assumption laid down in *Yekambaran*, it follows that it must be assumed that this report is material to the claims made by the plaintiffs which is anchored on the disappearance of Pastor Raymond Koh. To use the words prescribed by O 24 r 7(3) of the ROC, it would be a document:

(a) which could adversely affect the plaintiffs own case;

(b) adversely affect the defendants case; or

(c) support either of the plaintiffs' or any of the defendants' case; and

(d) which may lead the plaintiffs/applicants seeking discovery of it to a series of inquiry resulting in their obtaining information which may:

  (i) adversely affect their own case;

  (ii) adversely affect any of the parties' case; or

  (iii) support any of the parties' case.

[27] That would have disposed of the discovery application in favour of the plaintiffs. However, in their closing submissions presented both in writing and orally, with respect, the learned SFC mounted a blunderbuss approach, hoping that one of their shots would hit, and argued that:

(a) the true test is whether the discovery of the document will dispose of the proceedings justly and economically with reliance placed upon *ABX Logistics (Malaysia) Sdn Bhd v Overseas Bechtel (Malaysia) Sdn Bhd* [2003] MLJU 529; [2003] 7 CLJ 357;

(b) the plaintiffs are out on a fishing expedition, with reliance placed on the case of *Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40 and *Datuk Amar James Wong Kim Min & Anor v Pendaftar Pertubuhan* [2004] 6 MLJ 235;

(c) the necessity of the STF report has not been clearly demonstrated with

reliance placed upon *Malaysia Debt Ventures Berhad v Platinum Techsolve Sdn Bhd & Ors* [2020] MLJU 1421;

(d) the discovery sought will not be necessary for disposing fairly of the cause or matter or for saving costs, with reliance placed on O 24 r 8 of the ROC and *Protasco Bhd v Tey Por Yee & Anor and other appeals* [2021] 6 MLJ 1 at para 23;

(e) the STF report has not been pleaded;

(f) the findings of the SUHAKAM report are not binding on this court and the materials produced before the SUHAKAM proceedings are not governed by the Evidence Act 1950 and, are being litigated in this action; and

(g) the STF report having been marked as 'confidential' by reason of the Official Secrets Act 1972 is privileged from disclosure.

[28] Given the industry of the learned SFC, I will deal with their assertions. However, in my considered view, their assertions can be distilled into the following issues:

(a) fishing expedition;

(b) lack of pleading — that the STF report has not been pleaded;

(c) official secret — the STF report is privileged from disclosure; and

(d) not relevant — this covers both the necessity requirement, and that the discovery of the STF report will not dispose of the case justly and economically.

FISHING EXPEDITION

[29] As narrated above, the defendants admit in their affidavits that the STF report exists. For the defendants to then assert that the discovery application is a fishing expedition is a scurrilous challenge. I think no more need be said on this.

LACK OF PLEADING

[30] To meet this challenge learned counsel for the plaintiffs, very properly and succinctly replied that 'you plead facts, not evidence'. This is trite. Order 18 r 7 of the ROC, which is reproduced hereunder, expressly provides so:

> 7 Facts, not evidence, to be pleaded (O 18 r 7)
>
> (1) Subject to the provisions of this rule and rules 10, 11 and 12, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not

the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.

[31] In my considered view, besides that one pleads facts and not evidence, the lack of pleading point advanced by the defendants is devoid of merit for the following reasons:

(a) there is no averment that the STF report and its contents has come into the possession of the plaintiffs. Thus, as a matter of common sense, how are the plaintiffs to plead the same; and

(b) a discovery application can be allowed for an unpleaded issue, see *Yekambaran* for the point that there need not be a pleading for a matter to be in issue.

DELAY

[32] Although the issue of delay in making the discovery application was not raised by the defendants, I raised it. This is because the plaintiffs relied on the case of *Norhayati bt Mohd Ariffin v Mohd Russaini bin Idrus & Anor* [2023] 12 MLJ 445; [2023] 9 CLJ 304 which is a suit by the wife of Amri Che Mat against several police officers and the Government of Malaysia over their failure to effectively investigate the disappearance of Amri Che Mat. My attention was drawn to the fact that the STF report on the disappearance of Amri Che Mat had been ordered to be disclosed by His Lordship, Wan Ahmad Farid J in Norhayati although in a limited manner. And, I observed that the grounds for the decision of Wan Ahmad Farid J was handed down on 18 July 2023 which is one year ago.

[33] In response, learned counsel for the plaintiffs said that the suit was filed after the SUHAKAM report was released and the STF report came about after the action was filed. By the time they came to know of it, the trial of this action had commenced with the second plaintiff having taken the witness stand as PW4. They could not communicate with her until she has completed her testimony and, they have filed the discovery application soon after. Thus, they asserted there was no inordinate delay in filing the discovery application.

[34] From the court records, PW4 commenced giving evidence on 7 November 2023 and completed her testimony on 28 May 2024 when she was released as a witness with learned counsel for the plaintiffs placing on record that they would apply to have her recalled if the discovery application they intend to file is successful. The discovery application was filed on 30 May 2024. Based upon the objective facts as shown by the court records, I accept the explanation given by learned counsel, when otherwise it would have been treated as a submission of fact from the Bar with minimal probative value.

[35] Further, O 24 r 12 of the ROC provides, inter alia, that the court has the power to at any stage of the proceedings order discovery, a power which is to be exercised judiciously. See *Rotta Research Laboratorium SpA & Anor v Ho Tack Sien & Ors* [2010] 8 MLJ 733; [2010] 10 CLJ 491 at para 14; *Dibena Enterprise Sdn Bhd v Huawei Technologies (Malaysia) Sdn Bhd & Anor* [2012] MLJU 154; [2012] 8 CLJ 221 at para 2, and *Pangsapuri Anda Management & Ors v Pembinaan Safilo Sdn Bhd* [2021] MLJU 161 at para 70, for the principle that delay is not by itself sufficient reason to deny discovery if it fulfils the requirements of O 24 rr 12 and 13. On whether it is necessary or desirable in this case, I will address this below.

[36] Meanwhile, with respect, without having to look at the jurisdictions beyond our shores, I accept that there is a continuing obligation or duty for discovery imposed on the parties throughout the proceedings. And, this includes not only the trial of this action in the High Court but in any appeal that may be brought, see s 69 of the Courts of Judicature Act 1964 (Revised 1972). It follows that if discovery can be ordered even after the conclusion of the trial in this action, surely, delay per se is not fatal to a discovery application.

OFFICIAL SECRET

[37] The defendants claimed that the STF report has impressed thereon the word 'sulit' or 'confidential' and given the averments made by Syuhana bt Khalidi in her two affidavits (encls 108 and 121) as narrated above, by reason of the provisions of the Official Secrets Act 1971 ('the OSA'), it is privileged from disclosure.

[38] However, as pointed out by learned counsel for the plaintiffs, there are procedural requirements to be fulfilled before such a shield of secrecy can be put up. Reliance was placed on the case of *BA Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 146 where Raja Azlan Shah FCJ (as the late HRH was) held as follows at p 151:

> *A mere assertion of confidentiality and that affairs of state are involved without evidence in support cannot, in my view, shut out the evidence sought by the respondents.* Paragraph 2 admitted that the committee was set up by the ministry to inquire into the death of the deceased at the Hospital Daerah Mentakab on June 1, 1973. The terms of reference or any document relating thereto were not before the court. The affidavit went on in para 3 to broaden the base by asserting that the inquiry was 'to investigate into matters relating to the medical facilities and services and hospital administration existing in the Hospital Daerah Mentakab in 1973 with a view to make such comments and recommendations ... to enable my ministry to carry out its policy of promoting greater efficiency in hospital administration and the provision of medical services not only in respect of the Hospital Daerah Mentakab but also in respect of all hospitals throughout the country. '*I am of opinion that this was uttered with tongue in cheek and with no other object than to suppress evidence*

which may or may not assist the respondents in their claim based on negligence of the appellant medical officers and the government as their employer'.

[39] In *Rotta Research Laboratorium SPA* at paras 84 and 87 it was held that:

There was no issue of the inadmissibility of D3's Annex B on the ground of national security. No certificate was produced in court certifying that Annex B was an official secret and even if there was one it did not mean the document would be completely excluded from being disclosed in court. Annex B was admitted as an exhibit as it was relevant to the proceedings and its disclosure did not offend the OSA.

[40] A perusal of the three affidavits filed by the defendants:

(a) do not show that the STF report has been classified as an official secret by a public officer pursuant to s 2B of the OSA;

(b) do not show that the deponent of the two affidavits (encls 108 and 121), one Syuhana bt Khalidi, as well as the deponent of the primary affidavit in reply, Nurul Farhana bt Khalid (encl 107), have deposed that any one of them is a public officer certified under s 2B of the OSA empowered to certify an official document, information or material as an official secret; and

(c) there is no certificate produced under s 16A of the OSA certifying that the STF report is an official secret.

[41] Sections 2B and 16A of the OSA are reproduced hereunder to facilitate reading:

(a) s 2B — 'a Minister, the Menteri Besar or the Chief Minister of a state may appoint any public officer by a certificate under his hand to classify any official document, information or material as 'top secret', 'secret', 'confidential' or 'restricted', as the case may be.'; and

(b) s 16A — 'a certificate by a Minister or a public officer charged with any responsibility in respect of any, ministry, department or any public service or the Menteri Besar or the Chief Minister of a state or by the principal officer in charge of the administrative affairs of a state certifying to an official document, information or material that it is an official secret shall be conclusive evidence that the document, information or material is an official secret and shall not be questioned in any court on any ground whatsoever'.

[42] Guided by *Rotta Research Laboratorium* above, I agree with the submissions advanced by the plaintiffs that a mere statement that the STF report is 'sulit' or 'confidential' on the cover of a register saying 'Buku Daftar Suratan Rahsia Rasmi di luar Jadual/Bawah Akta Rahsia Rasmi 1972' does not

satisfy the pre-conditions of ss 2B and 16 of the OSA required to shield it with privilege against disclosure. Therefore, I am minded to follow the Federal Court decision in *BA Rao* instead of *Datuk Haji Dzulkifli bin Datuk Abdul Hamid v Public Prosecutor* [1981] 1 MLJ 112 relied upon by the defendants where the Federal Court said that 'if the originator or the owner of the document treats it and the information contained in it as a secret and clearly marks it and keeps it as such, we do not think that it is open to anyone to regard it as otherwise'.

[43] It follows that the learned SFC's *ipse dixit* that it is an official secret without evidence in support is insufficient, see *BA Rao.* This was held to be so by His Lordship, Wan Ahmad Farid J in *Norhayati bt Mohd Ariffin v Mohd Russaini bin Idrus & Anor* [2023] 12 MLJ 445; [2023] 9 CLJ 304 at paras 47–48. Surprisingly, despite the ruling in *Norhayati* on the STF report being an inquiry into the disappearance of two persons, one being the subject of a suit in *Norhayati* and the other being Pastor Raymond Koh who is the subject of this action, no efforts were made by the defendants in this later action, to proffer any reason in the three affidavits filed in opposition, why it is allegedly an official secret. The inference to be drawn is that there is none.

[44] The plaintiffs further raised issue estoppel in its written and oral submissions to challenge the objection that the STF report is an official secret. I have seen the limited order for discovery granted in *Norhayati* and with I being the presiding judge for the trial of both the action in *Norhayati* and this action, for the reasons I have already given, I find that it is not necessary nor wise for me to decide on this issue estoppel point.

RELEVANCY — NECESSARY OR DESIRABLE

[45] It is undisputed that the inquiry into the disappearance of both Pastor Raymond Koh and Amri Che Mat both by SUHAKAM and the special task force inquiry have been concluded with each of them having released their reports and findings respectively. The witnesses called during the SUHAKAM inquiry is largely duplicated in this action.

[46] The learned SFC forcefully asserted that the findings of SUHAKAM and the STF are not binding on this court and, thus, it is irrelevant and, by reason thereto, the STF report is of no necessity. Therefore, on this ground, the element of it being necessary as is required by O 24 r 7(4) of the ROC has not been met.

[47] The learned SFC also pointed out that unlike the proceedings in this court where the evidential requirements are governed by the Evidence Act 1950, it is expressly provided by sub-s 14(1)(d) of the Human Rights

Commission of Malaysia Act 1999 (Act 597) that the SUHAKAM commission shall, for the purposes of an inquiry have the power to admit notwithstanding any of the provisions of the Evidence Act 1950, any evidence, whether written or oral, which may be inadmissible in civil or criminal proceedings.

[48] However, in my considered view whilst the findings may not be binding on this court, subject to evaluation by this court and the weight to be attached, the evidence led during the SUHAKAM inquiry and the STF inquiry especially those that requires recollection of what was seen, heard and felt would be useful because they would be more contemporaneous in time. They can, in any event, be subjected to challenge and the procedural safeguards contained in the Evidence Act 1950 for purposes of admissibility and, the weight to the given thereto.

[49] Besides the evidence, subject to submissions, the findings although not binding, may be persuasive. It is not uncommon for courts to adopt findings made by sources whose decisions are not binding for eg courts of coordinate jurisdictions and courts from other jurisdictions in the Commonwealth or non-Commonwealth countries, or even experts such as assessors in land acquisition proceedings, document examiners, forensic pathologists, forensic psychiatrists, medical specialists, land valuers, surveyors and the list goes on.

[50] Therefore, in my considered view, the evidence and the findings on the very issue under consideration by this court — that of the disappearance of Pastor Raymond Koh, would be desirable. This satisfies the other element required under O 24 r 7(4) of the ROC.

PUBLIC RECORD — SS 35 AND 74 OF THE EVIDENCE ACT 1950

[51] Not leaving any stones unturned, learned counsel for the plaintiffs had another arrow in their bow. They asserted that the STF report is a public document and by reason thereto, is prima facie proof of its contents and is admissible.

[52] Section 35 of the Evidence Act provides that:

> An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.

[53] Section 74 provides as follows:

> The following documents are public documents:

A (a) documents forming the acts or records of the acts of —

(i) the sovereign authority;

(ii) official bodies and tribunals;

B (iii) public officers, legislative, judicial and executive, whether federal or state or of any other part of the Commonwealth or of a foreign country; and

(b) public records kept in Malaysia of private documents.

C **[54]** The plaintiffs asserted vide their affidavit filed in support of the discovery application (encl 94 paras 19 to 22) that the STF was established to investigate the SUHAKAM findings following an announcement by the then Home Minister of Malaysia, Tan Sri Muhyiddin Yassin. This was not denied by the defendants (encl 107 para 19) save to aver that the resultant STF report is D 'sulit' or confidential.

[55] Pointing to art 39 of the Federal Constitution and s 17 of the Enforcement Agency Integrity Commission Act 2009 ('the EAIC Act'), the plaintiffs asserted by way of further written submissions (encl 129) filed as E directed by this court, to support their position that the STF report is a public document. They submitted the STF *would most probably* have been established pursuant to either one or two of these provisions.

F **[56]** Article 39 of the Federal Constitution provides as follows:

> 39 Executive authority of Federation The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive functions on other persons.

G

[57] In *Kerajaan Malaysia v Shimizu Corp & Ors* [2018] MLJU 169; [2018] 1 LNS 202 at para 45, His Lordship, Lee Swee Seng J (now JCA), made the following observations:

H

> [45] Article 39 of the Federal Constitution recognises that executive authority may be exercised by the Cabinet, a Minister authorised by the Cabinet or persons authorised by a law passed by Parliament. I agree with learned counsel for the defendants that there are three ways that the plaintiff can demonstrate that a Minister or particular person has been properly authorised by law to exercise a I particular facet of executive power.

[58] Whilst learned counsel for the plaintiffs concede that they are not privy to the internal workings of the appointment of the government machinery in establishing the STF, they assert that the then Minister of Home Affairs *would*

have established the STF by virtue of art 39 of the Federal Constitution or the EAIC Act 2009. A

[59] Learned SFC vide letter dated 13 August 2024 (encl 131) mounted a belated challenge to the assertion by the plaintiffs that the STF report is one that *would have* been put up pursuant to the EAIC Act 2009. In their letter, the learned SFC drew the court's attention to the provisions of ss 4, 5, 17 and 22 of the EAIC Act 2009. From these provisions, the learned SFC asserts that it is clear that the members of the STF are not members appointed pursuant to the EAIC Act 2009, and in particular by the Yang Di-Pertuan Agong pursuant to s 5 thereof. A classic case of 'what is sauce for the goose is also sauce for the gander'. B C

[60] The provisions of ss 4, 5, 17 and 22 of the EAIC Act 2009 are reproduced hereunder: D

Section 4

(1) The functions of the commission are as follows:

(a) to receive complaints of misconduct from the public against an enforcement officer or against an enforcement agency in general and to investigate into and conduct hearings on such complaints; E

(b) to formulate and put in place mechanisms for the detection, investigation and prevention of misconduct by an enforcement officer;

(c) to protect the interest of the public by preventing and dealing with misconduct of an enforcement officer; F

(d) to provide for the auditing and monitoring of particular aspects of the operations and procedures of an enforcement agency;

(e) to promote awareness of, enhancement of, and education in relation to, integrity within an enforcement agency and to reduce misconduct amongst enforcement officers; G

(f) to assist the government in formulating legislation, or to recommend administrative measures to the government or an enforcement agency, in the promotion of integrity and the abolishment of misconduct amongst enforcement officers; H

(g) to study and verify any infringement of enforcement procedures and to make any necessary recommendations relating thereto; and

(h) to make site visits to the premises of an enforcement agency, including visiting police stations and lockups in accordance with the procedures under any written law, and make any necessary recommendations relating thereto. I

(2) The commission shall have power to do all things expedient or reasonably necessary for, or incidental to, the performance of its functions.

Section 5

(1) The Yang di-Pertuan Agong shall, on the advice of the Prime Minister, appoint not more than seven commissioners, of whom there shall be a chairman and a deputy chairman, for such period and on such terms and conditions as may be specified in the instrument of appointment.

(2) No person shall be eligible to be appointed as a commissioner if he is or was an enforcement officer.

(3) The appointment of commissioners under this section shall be published in the Gazette.

Section 17

(1) The commission may establish such number of task forces as it deems necessary to assist the commission in performing its functions effectively and efficiently under this act. The members of a task force may comprise the officers of the commission and the consultants engaged under section 15.

(2) A task force shall perform such functions and duties conferred upon the task force under this act.

(3) The members of a task force shall have all the powers of investigation as contained in the Criminal Procedure Code [Act 593] and such powers shall be in addition to the powers provided for under this act and not in derogation thereof.

(4) The commission may establish joint task forces with any other authorities as it deems necessary.

Section 22

(1) The commission shall have power to investigate any complaints of misconduct it receives from a member of the public or that are referred to it by any person.

(2) The commission shall have power to refer any complaints of misconduct it receives or that are referred to it under subsection (1) of a disciplinary nature to the appropriate disciplinary authority.

(3) The commission shall have power to refer any complaints of misconduct it receives or that are referred to it under subsection (1) of a criminal nature to the Public Prosecutor.

[61] The assertions on whether the provisions of the OSA have been complied with can be inferred from the affidavits filed. However, this cannot be said regarding whether the provisions of the EAIC had been complied with other than mere submissions from the Bar. Since it is the plaintiffs who are asserting that the EAIC Act 2009 applies and that there 'would have' been due compliance, I find that on the materials before the court, it is unsafe to draw such an inference.

[62] However, it is common ground that the STF was established by the Cabinet. In fact, as mentioned, the defendants asserted so vide paras 7.1 to 7.3 of their affidavit in reply (encl 108). Thus, it is safe to infer that the STF was established pursuant to the authority housed under art 39 of the Federal Constitution. In fact, in their letter of 13 August 2024, the learned SFC asserted that the STF was set up by way of an administrative decision made by the Cabinet but that it is not pursuant to any empowering provision. That it is an administrative decision made by the Cabinet would in my considered view be sufficient for it to come under the wide ambit of authority conferred by art 39 of the Federal Constitution.

[63] Applying the presumption in s 114(e) of the Evidence Act 1950 which I believe flowed from the maxim *omnia praesumunturrite esse acta* (that in the absence of evidence to the contrary, it is presumed that official acts have been done in accordance with all relevant technicalities), it follows that the STF report prepared by the STF appointed by the Cabinet is prima facie a public document. Undoubtedly, public resources and funds would have been expended in the setting up of the STF and the report produced thereby. Thus, it would be relevant pursuant to s 35 and 74 of the Evidence Act 1950. See also *Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors* [2000] 1 MLJ 65 at pp 75 and 76, and *Public Prosecutor v Lai Kon Ching & Anor* [1994] 3 MLJ 621 at p 621 Held (2).

[64] Even if I am wrong in treating the STF report as a public document, for the other reasons I have given, I am of the considered view that the application (encl 93) has merit and ought to be allowed.

CONCLUSION

[65] Wherefore, I grant an order in terms of the discovery application (encl 93) for the following prayers:

(a) that the defendants who have in their possession, custody, power and or control of the special task force report entitled 'Lapuran Pasukan Khas bagi Kehilangan Amri Che Mat dan Pastor Raymond Koh' (STF report) shall forthwith and in any event no later than three days from the date of this order produce for inspection and make copies to the second plaintiff or the plaintiffs' solicitors the STF report;

(b) that consequent to the order made for prayer (a) above, the second plaintiff or the plaintiffs' solicitors shall be at liberty to peruse and make copies of the STF report to be used as evidence at the trial of this suit; and

(c) the cost of this application be costs in the cause.

Order in terms of discovery application granted.

Reported by Nabilah Syahida Abdullah Salleh